

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE BENJAMIN CRADDOCK,

Defendant-Appellant.

UNPUBLISHED

October 13, 2011

No. 298951

Kent Circuit Court

LC No. 09-011559-FC

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his convictions, following a jury trial, of first-degree criminal sexual conduct (use of a weapon), MCL 750.520b(1)(e), and conspiracy to commit first-degree sexual conduct, MCL 750.157a(a), for which he was sentenced, as an habitual offender, fourth offense, MCL 769.12, to serve concurrent terms of 45 to 80 years in prison.¹ We affirm.

Defendant and the victim, his niece, were travelling in a rural area on defendant's motorcycle when defendant observed a man alongside the road. Defendant pulled the motorcycle to the side of the road. The man demanded money and then directed defendant into a wooded area away from the road where, displaying a gun, he ordered defendant and the victim to engage in sexual intercourse. The man, who was ultimately identified as Shawn Godfrey, told the victim that he would kill her if she refused. Defendant and the victim did as instructed. After they noticed that the man was no longer present, defendant and the victim returned to defendant's motorcycle and continued to their original destination.

Plaintiff's theory at trial was that defendant orchestrated these events, in conspiracy with Godfrey, in order to engage in sexual intercourse with the victim. Defendant did not dispute that the events transpired; however, he denied that he conspired with Godfrey or was in any way

¹ Defendant was also convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(d) (family relationship), arising from the same single penetration that formed the basis for his first-degree criminal sexual conduct conviction. The third-degree criminal sexual conduct conviction was "merged into" the first-degree criminal sexual conduct offense, and defendant was not sentenced for this offense.

complicit in the offenses, contending that he, too, was a victim. Godfrey testified at trial, consistent with the prosecutor's theory, that defendant asked him to assist in staging a robbery, and that he and defendant planned the factual scenario set forth above, so that defendant could engage in sexual intercourse with the victim.

Defendant first argues that he was denied his constitutional right to a fair trial when a police detective was allowed to testify that, when attempting to obtain a statement from Godfrey, she told Godfrey that police "believed 100 percent" that defendant "had orchestrated this entire event." Defendant asserts that this statement constituted impermissible opinion testimony by the detective as to defendant's guilt, and that it also improperly vouched for Godfrey's credibility and bolstered his testimony.

Defendant's challenge to this testimony on the grounds presented to this Court is unpreserved. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground."). This Court reviews defendant's unpreserved challenge to the presentation of testimony at trial for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). For a plain error to affect defendant's substantial rights it must have affected the outcome of the proceedings and defendant has the burden of establishing such prejudice. *Id.*; *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003).

It is improper for a witness to provide an opinion regarding the guilt or innocence of a criminal defendant because that determination is solely reserved to the trier of fact. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). It is also improper for a witness to provide an opinion on another witness's credibility, as credibility determinations, too, are within the sole province of the trier of fact. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Contrary to defendant's assertion, however, the detective did not testify that defendant orchestrated the events with Godfrey or that she personally believed that defendant was guilty. Rather, the detective's testimony was intended to provide information concerning the course and chronology of the police investigation and, in particular, explaining the actions police officers took to obtain Godfrey's statement.

Further, the trial court instructed the jury that it was not permitted to consider the detective's testimony in deciding defendant's guilt, but rather, only "to understand what law enforcement authorities did next, why they did it, and how it was that Shawn Godfrey wound up on the witness stand here at trial." "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has not established plain error arising from this testimony.

Defendant also challenges the trial court's scoring of offense variables (OV) 7, 10 and 19. This Court reviews defendant's preserved challenge to the trial court's scoring decisions under the sentencing guidelines "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (citation omitted). This Court will uphold a trial court's scoring decision if there is any evidence to support it. *Id.* This Court reviews any attendant issues involving the interpretation or application of the statutory sentencing guidelines de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

Defendant received a prior record variable score of 40 points, and a total OV score of 110, placing him in cell D-VI of the Class A offense grid for purposes of determining his recommended minimum sentence under the legislative guidelines. OV level VI includes scores of “100+” points. MCL 777.62. An error in scoring the sentencing guidelines which does not affect the total offense variable score enough to change the applicable sentencing guidelines range is harmless error. *People v Francisco*, 474 Mich 82, 89, n 8; 711 NW2d 44 (2006).

OV 7 addresses aggravated physical abuse. MCL 777.37(1). It is to be scored at 50 points if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). The trial court scored OV 7 at 50 points, finding that defendant acted in a manner designed to substantially increase the victim’s fear and anxiety during the offense. The trial court noted that the victim was “taken to the middle of nowhere” where she could not seek help and where she was more likely to submit to the sexual assault, and that she was threatened with death if she refused to engage in sexual conduct with defendant. Additionally we note that defendant recruited Godfrey, a stranger to the victim, to pose as a gunman for the purpose of inducing the victim to submit to his sexual assault. Defendant provided Godfrey with a gun and instructed Godfrey to use the weapon to get the victim to remove her pants and lie down on the ground, so that defendant could perpetrate the offense. This evidence supports the trial court’s conclusion that defendant acted in a manner “designed to substantially increase the fear and anxiety of the victim during the offense.” MCL 777.37(1). Thus, the trial court properly exercised its discretion to score OV 7 at 50 points.

OV 10 addresses the vulnerability of the victim. MCL 777.40. It is to be scored at ten points if “[t]he offender exploited a victim’s physical disability, mental disability, youth or agedness or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). Vulnerability is defined to be a “readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c). Further, to exploit means to “manipulate a victim for selfish or unethical purposes.” MCL 777.40(3)(b). The trial court scored OV 10 at ten points, explaining that defendant exploited his familial relationship with the victim to manipulate her into accompanying him to a remote secluded location in order to sexually assault her. The evidence presented at trial supports this conclusion. Defendant used his familial relationship with the victim to manipulate her into a situation that permitted him to sexually assault her and she was vulnerable to his actions as a result of that familial relationship. The trial court did not abuse its discretion by scoring OV 10 at ten points.²

OV 19 addresses a defendant’s attempts to interfere with the administration of justice. MCL 777.49. It is to be scored at ten points if a defendant “otherwise interfered with or attempted to interfere with the administration of justice.” MCL 777.49(c). The trial court scored

² Plaintiff argues that OV 10 should have been scored at 15 points. However, this Court need not address plaintiff’s argument because it was not properly raised by cross-appeal. MCR 7.207; see also *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993).

OV 19 at ten points based on defendant's conduct in attempting to dissuade the victim from reporting the incident to police, as well as in testifying falsely at the preliminary examination for another individual that was originally charged with the instant offense. Defendant asserts that it was impermissible for the trial court to score OV 19 on the basis of conduct that occurred after the completion of the charged offenses, citing to *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009). But, our Supreme Court held in *People v Smith*, 488 Mich 193, 195; 793 NW2d 666 (2010), *McGraw* does not apply to OV 19 because the conduct addressed by OV 19 is by its nature conduct that will occur after completion of the sentencing offense. Thus, "[b]ecause OV 19 specifically provides for the 'consideration of conduct after completion of the sentencing offense,' conduct that occurred after an offense was completed may be considered when scoring the offense variable." *Id.* at 202. Therefore, the trial court was permitted to consider defendant's post-offense conduct in scoring OV 19, and record evidence amply supported the court's scoring of ten points.

We affirm.

/s/ Jane E. Markey
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause